

Vol 3

DEC 6 1940

CHARLES ELMORE COFFLEY
CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, A. D. 1940.

No. 612

MISSOURI PACIFIC TRANSPORTATION COMPANY,

and

COMMERCIAL CASUALTY INSURANCE COMPANY OF NEWARK,
NEW JERSEY, INTERVENOR, *Petitioners*,

v.

J. C. GEORGE, J. H. LOOKADOO and G. W. LOOKADOO,
Respondents.

**PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE EIGHTH CIRCUIT AND BRIEF IN SUP-
PORT THEREOF.**

R. W. GRIFFITH, JR.,
LLOYD W. DAVIDSON, JR.,
BRICKHOUSE & BRICKHOUSE,
McCraw & Holt,

*Attorneys for Petitioners, Mis-
souri Pacific Transportation
Company and Commercial
Casualty Insurance Company
of Newark, New Jersey.*

FRANK H. MYERS,
Of Counsel.



INDEX.

	Page
Petition for Writ of Certiorari	1
Synopsis of Point Involved	2
References to Proceedings Below	2
Short Statement of the Facts	3
Points Relied Upon for Allowance of Writ.....	6
Brief in Support of Petition for Writ of Certiorari....	9
Jurisdiction	9
Additional Statement of Facts	10
Excerpts from Majority and Dissenting Opinion in the Supreme Court of Arkansas	12
Opinion of Majority, Supreme Court of Arkan- sas	13
Dissenting Opinion of Chief Justice Griffin Smith, Concurred in by McHenry and Holt, J. J.	13
Specifications of Error	14
Argument	14
Petitioners Were Entitled to Trial by Jury, as a Matter of Right, Under the Seventh Amendment	14
The Request for Jury Trial was Timely Served..	17
The Complaint Raised Issue of Extrinsic Fraud Requiring Upon Demand, Trial by Jury.....	18

APPENDIX "A".

Opinion of Supreme Court of Arkansas, Oct. 23, 1939, Missouri Pac. Transp. Co. v. George, No. 45581..	22
--	----

APPENDIX "B".

Opinion of Supreme Court of Arkansas, Rehearing De- nied June 10, 1940, Missouri Pacific Transp. Co. v. George, No. 45950	47
---	----

APPENDIX "C".

Opinion of United States Circuit Court of Appeals Eighth Circuit, No. 11,792, May Term, 1940 on Ap- peal from District Court of the United States for Eastern District of Arkansas, Missouri Pacific Transp. Company and Commercial Casualty In- surance Company of Newark, New Jersey v. J. C. George, et al.	52
---	----

APPENDIX "D".

Extract from Second Amended Complaint Filed in U. S. District Court (R. 43, <i>et seq.</i>)	56
---	----

CASES CITED.

American Mills Co. v. Surety Co., 260 U. S. 360, 364. . .	15, 16
American Soda Fountain Co. v. Futrall, 84 S. W. 505. . .	15
Arrowsmith v. Gleeson, 129 U. S. 86, 32 L. Ed. 630. . .	19
Chi. Ry. & P. R. Co. v. Callicotte, 267 Fed. 797, 16 A. L. R. 386	19
Henrietta Mills v. Rutherford County, 281 U. S. 121. .	16
Marshall v. Holmes, 141 U. S. 589, 35 L. Ed. 870. . . .	19
McDaniel v. Traylor, 196 U. S. 415, 49 L. Ed. 533. . . .	19
Pacific Indemnity Co. v. McDonald, 25 F. Supp. 21. . . .	16, 17
Scott v. Neely, 140 U. S. 106	15, 16
Simon v. Southern Railroad Co., 236 U. S. 115, 51 L. Ed. 492	19

STATUTES AND RULES.

Crawford & Moses Digest, Statutes of Arkansas, Sec. 6292	15, 19
Judicial Code, Sec. 240-A as amended	9
Rules of Civil Procedure, Rule 18	15
Rules of Civil Procedure, Rule 38 and 38(b)	17, 18, 20

IN THE
Supreme Court of the United States

OCTOBER TERM, A. D. 1940.

No. _____.

MISSOURI PACIFIC TRANSPORTATION COMPANY,
and
COMMERCIAL CASUALTY INSURANCE COMPANY OF NEWARK,
NEW JERSEY, INTERVENOR, *Petitioners*,
v.
J. C. GEORGE, J. H. LOOKADOO and G. W. LOOKADOO,
Respondents.

**PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE EIGHTH CIRCUIT.**

To the Honorable, the Chief Justice and Associate Justices
of the Supreme Court of the United States:

Petitioner seeks to have reviewed here a decision of the
United States Circuit Court of Appeals for the Eighth Cir-
cuit. The opinion of the Circuit Court of Appeals is re-
ported in 114 Fed. (2d) 757, and is printed in the appendix
to this petition at page 52.

SYNOPSIS OF POINT INVOLVED.

Judgment entered against petitioner, Missouri Pacific Transportation Company, in the Circuit Court of Clark County, Arkansas, in a suit by respondent, J. C. George, for personal injuries, was affirmed by the Supreme Court of Arkansas, and became final. Petitioners (defendant in the state court and the surety upon its supersedeas bond) sought through a collateral attack on the judgment in the United States District Court for the Eastern District of Arkansas, to recover of respondents (plaintiff in the state court and his counsel) damages in the amount of the state court judgment plus interest and costs, praying in addition to the money judgment injunctive relief to prevent respondents from realizing upon their judgment in the State Court. The basis of petitioner's Federal suit was newly discovered evidence of conspiracy and fraud in faking the injuries complained of and in prosecuting the false claim to judgment.

Petitioners were denied a trial by jury in the District Court, and such denial affirmed by the Circuit Court of Appeals. Petitioners seek this review upon the ground that denial of trial by jury of its suit in the District Court infringed its rights under the Seventh Amendment to the Constitution.

REFERENCES TO PROCEEDINGS BELOW.

The original tort action was begun in the Circuit Court of Clark County, Arkansas, and judgment there was affirmed on appeal by the Supreme Court of Arkansas (133 S. W. (2d) 27, 198 Ark. 1110). A motion for new trial was filed, on ground of newly discovered evidence, which motion was denied by the trial court and such denial affirmed. (140 S. W. (2d) 680)

The action wherein respondents' constitutional rights are alleged to have been infringed was begun in the United States District Court for the Eastern District of Arkansas (jurisdiction there being by virtue of diversity of citizen-

ship). A plea of *res adjudicata* was sustained without hearing testimony, and upon appeal the cause reversed and remanded by the Circuit Court of Appeals. (R. 38)

After the case was remanded, leave of Court having first been obtained, on July 15, 1940 plaintiffs filed a second amended complaint, setting up new matter. (R. 43) Answer of defendants to this amended complaint was filed July 16, 1940. (R. 25) Demand for a jury trial was first filed July 11, 1940, but then only in behalf of Missouri Pacific Transportation Company. (R. 52) On July 15, 1940, the day the amended complaint was filed, plaintiff and intervenor joined in a written motion for jury trial (R. 53), and such motion was orally renewed at the hearing. (R. 78) No point was ever made in the District Court that the requests for jury trial were not properly and timely made and served. Upon hearing a finding was had against petitioners on the merits of the case (R. 59, 62(15), 63) and the action of the District Court affirmed by the Circuit Court of Appeals. (R. 641) The opinion of the Circuit Court of Appeals is reported at 114 F. (2d) 757, and is printed in the appendix hereto at page 52.

SHORT STATEMENT OF THE FACTS.

J. C. George sued Missouri Pacific Transportation Company and the driver of one of its motor busses in the Circuit Court of Clark County, Arkansas, for damages in the sum of \$50,000 for alleged personal injuries growing out of a purported bus accident in the city of Gurden, Clark County, Arkansas. Suit was tried by a jury, resulting in a verdict for \$15,000 with interest and costs. Appeal was taken to the Supreme Court of the State of Arkansas and the judgment affirmed. A motion and amended motion for new trial, filed on the grounds of newly discovered evidence, was overruled, and an appeal taken to the Supreme Court of Arkansas, which affirmed the action of the trial court. (140 S. W. (2d) 680)

In the appeal that was taken from the state court decision by the Missouri Pacific Transportation Company, its

co-petitioner here, Commercial Casualty Insurance Company, executed a bond as surety. J. C. George, plaintiff in the state court case, in whose favor the judgment was rendered, was represented by his co-respondents here, attorneys J. H. Lookadoo and G. W. Lookadoo.

The District Court suit was filed as a collateral attack upon the judgment obtained by J. C. George in the state court.

By virtue of Rule 18 of the Rules of Civil Procedure both legal and equitable relief was prayed: damages for \$15,000.00, the amount of the state court judgment, and injunctive relief against levying execution.

Petitioners' case in the District Court was founded on allegations of conspiracy and fraud on the part of defendant George and his attorneys, Messrs. Lookadoo, in preventing witness Claude Denson through coercion and duress from testifying truthfully on a motion for new trial. After trial in the state court defendants learned for the first time that plaintiff George had deliberately planned to fake and simulate an injury in order to mulct damages from the Missouri Pacific Transportation Company. They obtained an affidavit to that effect, but George and his attorneys got hold of Denson and by threats to bring about the imprisonment of himself and his father, caused him to retract his affidavit and to commit perjury. (R. 80, *et seq.*) The complaint also alleged that fraud was perpetrated through the promise of payment of \$500.00 to one John Smith, the only witness who testified that he saw the accident, and that said John Smith was in fact at home in bed at the time the accident allegedly took place. This information regarding witness Smith was first obtained by petitioners after the original complaint had been filed in the District Court, and hence was set out for the first time in the second amended complaint, filed July 15, 1940. (R. 43, 49)

Upon filing of suit in the District Court, an order to show cause was issued to prevent execution under the state court judgment. Respondents answered and among other things

urged the plea of res judicata which plea was by the trial court sustained. (Order of June 21, 1940, R. 29 *et seq.*) Objections were urged to the findings of fact and conclusions of law, for no testimony had been heard upon which any finding or conclusion could be predicated. Missouri Pacific Transportation Company made application to the court for stay pending appeal to the United States Circuit Court of Appeals. The application was refused and appeal perfected to the United States Circuit Court with an application that it retain the status quo and prevent the subject matter of the suit from being moot pending determination of the appeal. Upon consideration of the application, the United States Circuit Court of Appeals suggested that reversal would probably follow because of the court's failure to take testimony, whereupon respondents moved that the suit be immediately reversed and remanded to the District Court. By agreement of the parties an order was entered July 5, 1940, reversing and remanding the cause. (R. 38) Execution had also issued against Commercial Casualty Insurance Company of Newark, New Jersey, and the restraining order extended to said insurance company for the protection of petitioners herein until the cause could be heard upon its merits by the District Court. Mandate issued in response to the order of the court dated July 5, 1940. (R. 38) The case was immediately set for hearing July 16, 1940, *whereupon demand was made July 11, 1940, for trial by jury.* (R. 52, 53)

On July 15, 1940, the parties appeared before the District Court, whereupon respondent, Commercial Casualty Insurance Company was granted leave to intervene, and Missouri Pacific Transportation Company was granted permission to file its second amended bill of complaint. (R. 43) At the conclusion of the July 15th hearing, petitioners renewed, served and filed their application for trial by jury, which was by the court refused "*pending further consideration and decision of the equitable issues involved in said action.*" (R. 53, 54 (4 & 6)) On July 16, 1940, the

parties again appeared before the District Court, whereupon respondents renewed and urged their plea of res judicata. The court after hearing testimony in support of said plea announced that he would hear testimony upon the merits of the case; *whereupon, appellants renewed their application for trial by jury and were again refused.* (R. 78) The District Court having heard testimony of the parties and considered their request for findings of fact and conclusions of law, on July 17, 1940, sustained the plea of res judicata and entered its order dismissing the bill for want of equity and merit. (R. 59-63) A second application was made to the United States Circuit Court of Appeals upon presentation of a skeleton record disclosing that an appeal had been taken for injunctive relief pending the determination of the appeal, which application was granted and bond filed July 22, 1940. (R. 626)

The United States Circuit Court of Appeals rendered its opinion affirming the decision of the United States District Court for the Eastern District of Arkansas on the 1st day of October, 1940.

Applicants filed their petition for rehearing within fifteen days of the date of rendition of said opinion and the United States Circuit Court of Appeals for the Eighth Circuit entered its order overruling applicant's petition for rehearing on the 21st day of October, 1940. (R. 656)

POINTS RELIED UPON FOR ALLOWANCE OF WRIT.

I.

The suit in the District Court contemplated two forms of relief, cognizable in the same complaint only by virtue of the new Federal Rules of Civil Procedure: (first) a money judgment for the damages suffered as a result of the conspiracy and fraud, and (secondly) injunctive relief against collection of the judgment in the state court to the end that the District Court judgment, if in favor of petitioners, might not be moot.

Since trial by jury obviously would have been petitioners' constitutional right in a separate suit filed for damages prior to the effective date of the new rules, petitioners cannot be deprived of that right merely because, pursuant to new rules of court, adopted to simplify federal practice, they asked for both forms of relief in the same complaint.

II.

Rule 18 of the Rules of Civil Procedure permitting joinder of claims and remedies should not be construed—inconsistently with Rule 30 which preserves the right to trial by jury as declared by the Seventh Amendment—so as to deprive litigants who have joined legal and equitable actions thereunder of their constitutional right to trial by jury which would otherwise exist.

III.

Denial of a trial by jury of its action in the District Court was violative of the Seventh Amendment to the Constitution of the United States. The complaint alleged that judgment in the state court resulted from conspiracy and fraud and the action was brought for relief against the judgment so obtained. Because the issue of fraud in obtaining the judgment was one dependent upon evidence extrinsic of the judgment itself, it presented an issue triable as a matter of right under the Seventh Amendment to the Constitution.

Wherefore, your petitioners respectfully pray that a writ of certiorari be sued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Eighth Circuit, commanding that court to certify and send to this court for its review and determination on a day certain to be therein named, a full and complete transcript of the record and proceedings in cause No. 11,792, Missouri Pacific Transportation Company, plaintiff, and Commercial Casualty Insurance Company of Newark, New Jersey, intervener, v. J. C. George, J. H. Lookadoo

and G. W. Lookadoo, and that the judgment of the United States District Court for the Eastern District of Arkansas, Little Rock Division, and the judgment affirming the same of the United States Circuit Court of Appeals for the Eighth Circuit, be reversed and that your petitioners may have such other and further relief in the premises as this Honorable Court may deem proper.

R. W. GRIFFITH, JR.,
LLOYD W. DAVIDSON, JR.,
BRICKHOUSE & BRICKHOUSE,
McCRAW & HOLT,

*Attorneys for Petitioners, Mis-
souri Pacific Transportation
Company and Commercial
Casualty Insurance Company
of Newark, New Jersey.*

FRANK H. MYERS,
Of Counsel.



71



IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1940.

—
No. ———.
—

MISSOURI PACIFIC TRANSPORTATION COMPANY,
and
COMMERCIAL CASUALTY INSURANCE COMPANY OF NEWARK,
NEW JERSEY, INTERVENOR, *Petitioners*,

v.

J. C. GEORGE, J. H. LOOKADOO and G. W. LOOKADOO,
Respondents.

—
**PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF
APPEALS FOR THE EIGHTH CIRCUIT.**

—
**BRIEF IN SUPPORT OF PETITION FOR WRIT OF
CERTIORARI.**

—
JURISDICTION.

The jurisdiction of this court is invoked under the provisions of Section 240-A of the Judicial Code as amended by the Act of February 13, 1935, and Rule 38, subdivision 1 of this Court. Petitioners assert that their federal rights were invaded by both the United States District Court for the Eastern District of Arkansas by the decree rendered in that court and its affirmance by the United States Circuit

Court of Appeals for the Eighth Circuit, and that petitioners are entitled to invoke the judgment of this Honorable Court for relief.

ADDITIONAL STATEMENT OF FACTS.

Under the heading "Short Statement of the Facts" in the petition, a brief review has been given of the facts pertinent to the points relied upon for issuance of the writ, which statement is now referred to and adopted as a part of this brief.

It will be seen by reference to the second amended complaint (R. 43, also printed as Appendix D hereto) that the federal suit was based upon recitals that plaintiffs had newly discovered that the key witness John Smith had been promised \$500.00 for testifying falsely that he had seen the alleged accident, and that fraud and duress exercised upon Claud Denson had caused him to perjure himself at the hearing upon motion for a new trial. The following additional facts regarding witness Denson appear undisputed in the record:

Mr. J. H. Lookadoo knew, at the time he sent for Claud Denson to come back from Oregon, the contents of the affidavit Claud Denson had made. (R. 145 *et seq.*) Mr. G. W. Lookadoo was advised of the contents of the affidavit Claud Denson had made contending the purported accident of J. C. George was false and simulated at the time he drove the father of Claud Denson to DeQueen, Arkansas, and then, accompanied by a deputy sheriff, went to the home of Claud Bailey, where Claud Denson was contacted by his father. (R. 173) Forrest Denson was advised of the contents of the affidavit Claud Denson had made at the time he accompanied Mr. G. W. Lookadoo to DeQueen, Arkansas, for the purpose of advising him that unless Claud Denson changed his statement, they would be sent to the penitentiary. (R. 80, *et seq.*) A felony charge had been lodged against Forrest Denson at the time. (R. 80 *et seq.*) G. W. Lookadoo and Forrest Denson did secure the services of a

deputy sheriff at DeQueen, Arkansas, preparatory to going and interviewing Claud Denson. (R. 84) The deputy sheriff, Mr. Manning, accompanied Mr. Lookadoo and Forrest Denson to the home of Claud Bailey, where Claud Denson was interviewed, and was introduced to Claud Denson as a deputy sheriff. (R. 85) Forrest Denson advised his son, Claud Denson, that unless he changed his statement and testified favorably to J. C. George, he would be sent to the penitentiary and Claud Denson would go back to the reformatory. (R. 85-86) This admission is also made by Claud Denson. (R. 131) To the same effect is the testimony of Mrs. Annie Bailey, (R. 102) Claud Bailey admitted (R. 132):

"My dad told mother he wanted to bring me back to Arkansas and she told him she did not want me to come and my dad said I had to go or both of us would go to the pen. And my mother said I would not have to go if I just told the truth. But dad thought I did. On that occasion my mother and I cried and I was excited. I did not want to go back to the pen or have to go there. I would not have went to Arkadelphia and made the statement I did make but for the things that were said to me and in my presence on that occasion. I certainly would not have done it. The statement I made to the bus company people was true. I still say it is true. I testified later at a motion for new trial or rehearing or new trial. I testified that the statement I had given the transportation company was not true because of what they told me, that I would have to go back to the penitentiary. I was afraid for dad, too. I have always lived with my father except this one trip. The relationship between me and my father has always been friendly all the way through. Me and my father had always been close."

Under these circumstances Claud Denson, who was visiting with his mother at the home of his aunt, Mrs. Bailey, near DeQueen, Arkansas, entered an automobile with his father, Forrest Denson, one of the defendants, Mr. G. W. Lookadoo, and a deputy sheriff, Mr. Manning. He rode

from the home of Mr. Teeter a few miles across the line in the state of Oklahoma over to Arkadelphia, Arkansas, and was taken to the office of J. H. Lookadoo, where a statement was dictated by J. H. Lookadoo in the presence of Forrest Denson. Claud Denson signed the statement. He was a lad then sixteen or seventeen years old and remained in the custody of his father for a day or two until he was placed upon the witness stand to testify on the motion for new trial. Forrest Denson further admitted (R. 178):

"I recall having come to the office of Mr. Lookadoo in company with Mr. Terrell. I recall what the purpose was of going to the office. They brought me up there to try to get me to change the statement. I do remember the conversation which took place in the office, in which I said—well, I just told them I wasn't going to change it, I told them I wasn't going to change the statement, that I was telling the truth. J. H. Lookadoo, General (G. W. Lookadoo) and Mr. Terrell was present then."

It is true Mr. G. W. Lookadoo and Mr. J. H. Lookadoo testified that they never told Claud Denson to say anything but the truth. They do not dispute nor deny, however, that the threats and duress hereinabove set forth occurred and no witness denies or disputes the testimony that the threats were made and that the threats, duress and fraud so established was responsible for Claud Denson's conduct.

EXCERPTS FROM MAJORITY AND DISSENTING OPINIONS IN THE SUPREME COURT OF ARKAN- SAS.

Petitioners have endeavored to state here only those facts directly supporting the points relied upon for allowance of the writ; the following excerpts from the majority and dissenting opinions in the Supreme Court of Arkansas, where the judges were compelled to study the entire voluminous record, furnish a background against which the facts pertinent here show up more clearly.

Opinion of Majority, Supreme Court of Arkansas.

"In this case if we were triers of facts we might believe appellee to be a chronic plaintiff seeking by devious ways and methods to extort by 'hand-made' processes money from those with whom he came in contact, and although we might feel that the verdict is contrary to preponderance of the evidence, yet we are powerless in the face of this constitutional provision (of Arkansas) as construed throughout the years to enter that field so peculiarly belonging to the jury."

Dissenting Opinion of Chief Justice Griffin Smith, Concurred in by McHenry and Holt, J. J.

"Aside from inconsequential testimony the jury's verdict, in respect of appellant's negligence and consequent liability, rests entirely upon the testimony of appellee—the vitally interested party who asked that he be compensated to the extent of \$50,000, and who has recovered \$15,000. True, the witness, Smith, made certain statements; but, on cross-examination, he admitted that he was not in a position to see the transaction. What he says, therefore, is of but slight importance. The bolstering potentiality of his words is of no more significance than would be the voice of a stranger crying in the wilderness of would-be helpfulness.
* * *

"This brings us to a discussion of the credibility to be given appellee's testimony. * * *

"We have, then, the situation of an interested witness who has impeached himself—a witness whose objective was to recover \$50,000, * * *

"Against appellee's own repeated declarations of injury in 1929, against his assertions of aggravation in 1933, against the testimony of competent and disinterested witnesses who negative the accusation of negligence upon appellant's part, against Dr. McClain's testimony that appellee, when attended at the hotel immediately after the incident, 'Smelled pretty strong of whiskey, talked a little like a drunk man, and had all the movements of a drunk man'; against Dr. McClain's statement that appellee, when driven home, got out of the car unaided and walked up an

embankment to his home—in utter disregard of everything suggested by reason and common sense in connection with the affair—we, as members of the appellate court, recline supinely behind a judicial dogma and permit a scandalous miscarriage of justice to be consummated by virtue of a jury's apparent acceptance of testimony so glaringly insufficient as to shock the sensibilities of thinking people.
• • •

“The writer of this opinion adheres to the view (presented by a philosophy often discussed but seldom analyzed) that human rights are paramount to property rights; and in litigation where these rights are in conflict, sympathy for the so-called ‘underdog’ invariably suggests restitution or compensation in favor of the plaintiff where a doubt exists as to relative issues. This adherence to a philosophy of right, however, does not go to the extent of sanctioning perjury and wrecking the rules by which society is maintained in order that one who suddenly finds himself in misfortune may place his hands in the pocket of another and help himself to the abundance he conceives to be deposited there.”

SPECIFICATIONS OF ERROR.

Petitioners respectfully refer to “Points Relied upon for Allowance of Writ” petition, *supra*, page 6, and adopt each of the grounds there stated as a specification of error which justifies issuance of a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit and requires reversal of the judgment of the United States District Court for the Eastern District of Arkansas, Little Rock Division.

ARGUMENT.

Petitioners Were Entitled to Trial by Jury, as a Matter of Right, Under the Seventh Amendment.

Prior to adoption of the new Federal Rules of Civil Procedure petitioners could not have demanded in either the state or federal court, money damages for the fraud perpetrated upon them and in the same proceeding have obtained relief by enjoining the successful litigants in the

state court from executing upon the judgment obtained. Two separate and independent suits would have had to have been filed and maintained. *Scott v. Neely*, 140 U. S. 106, *American Mills Co. v. Surety Co.*, 260 U. S. 360, 364; *American Soda Fountain Co. v. Futrell* (Supreme Court of Arkansas), 84 S. W. 505. Section 6292, Crawford and Moses Digest of Statutes of Arkansas.

By Rule 18 of the Rules of Civil Procedure, effective September 16, 1938, a plaintiff is permitted to join in his complaint "either as independent or as alternate claims as many claims either legal or equitable or both as he may have against an opposing party." Pursuant thereto, in the second amended complaint filed in the instant cause July 15, 1940, plaintiffs prayed for an injunction restraining defendants from levying or executing upon the judgment of the state court, and, in the alternative prayed a money judgment against the defendants in "the sum of \$15,000.00, together with regular interest thereon from November 11, 1938, and for costs in the cause of J. C. George v. Missouri Pacific Transportation Company, rendered by the Circuit Court of Clark County, Arkansas."

Plaintiffs' second amended complaint in the federal suit alleged evidence newly discovered since denial of its motion for new trial in the state court to the effect that the key witness John Smith had been promised payment for testifying falsely at the original trial, and that upon the motion for new trial, the witness Claude Denson had been threatened and coerced into giving perjured testimony which resulted in dismissal of the motion.

Had this complaint contained only the prayer for money damages, could there be any doubt but that plaintiffs would have been entitled to a trial by jury under the Seventh Amendment? Petitioners think not, and deem it unnecessary to cite authorities. Did they, then, forfeit their right to trial by jury because under the new Rules they joined their request for money damages with a request for equitable relief?

In *Scott v. Neely*, 140 U. S. 106, the question arose under a statute of Mississippi authorizing a bill in equity to subject property of a defendant to a lien and payment of a contract debt prior to proceedings at law to establish the validity and amount of the debt, whether such an action could be maintained in the federal courts. This Court held that while the equitable right created by the state statute could be enforced in the federal courts, such enforcement could not impair the right conferred by the Seventh Amendment to trial by jury—

“The Constitution, in its Seventh Amendment, declares that ‘in suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved.’ In the federal courts this right cannot be dispensed with, except by the assent of the parties entitled to it, nor can it be impaired by any blending with a claim, properly cognizable at law, of a demand for equitable relief in aid of the legal action or during its pendency. Such aid in the federal courts must be sought in separate proceedings to the end that the right to trial by jury in the legal action may be preserved intact.”

See also *American Mills Co. v. Surety Co.*, 260 U. S. 360; *Henrietta Mills v. Rutherford County*, 281 U. S. 121; *Pacific Indemnity Co. v. McDonald*, 25 F. Supp. 21.

In *Pacific Indemnity Co. v. McDonald*, *supra*, where the Court upheld the right to trial by jury in a declaratory judgment proceeding, where there were mixed questions of law and fact, the Court said—

“In this particular hour of challenge to Democratic institutions abroad and of little faith by many in our own country in the forms and processes of Democracy, American courts should not hesitate to re-declare their faith in the jury system.

“As we contemplate the brutalities of despotic power arbitrarily exercised in other lands, we can well say with Blackstone, that the right to jury trial is the

glory of our law, as the great Commentator felt it to be the glory of the English law."

Rule 38 of the Rules of Civil Procedure was apparently framed to meet the exigencies of the principle announced in *Scott v. Neely*, for it announces that the right of trial by jury "shall be preserved to the parties inviolate," and provides that "any party may demand a trial by jury of any issue triable of right by a jury".

It is submitted that the provisions of Rule 38(b) with respect to the right to demand jury trial "of any issue" was worded so as not to conflict with Rule 18, which permits joinder of legal and equitable claims.

The Request for Jury Trial was Timely Served.

Rule 38(b) of the Rules of Civil Procedure, reads as follows:

"(b) DEMAND. Any party may demand a trial by jury of any issue triable of right by a jury by serving upon the other parties a demand therefor in writing at any time after the commencement of the action and not later than ten days after the service of the last pleading directed to such issue. Such demand may be endorsed upon a pleading of the party."

The record shows that the second amended complaint, filed July 15, 1940, set up new matter and presented issues of fraud regarding witness John Smith, the facts with respect to which were unknown to plaintiffs at the time the original complaint was filed. The answer of defendants to this complaint was not filed until July 16, 1940 (R. 25, 29) and hence plaintiffs under the Rule had until July 26th to make their request. One would naturally infer, however, that where trial intervenes in less than ten days after the last pleading directed to the jury issue, demand would have to be made at some time prior to the trial. In this case the first demand was made July 11, 1940 (R. 52) and

renewed on July 15. (R. 52, 53) The record affirmatively shows that the request for trial by jury was renewed in open court prior to the hearing on July 16, 1940, when defendants' counsel were present. (R. 78, 79) It will be recalled that the District Court judge based his ruling denying jury trial upon a theory that the equitable issues prevented the right from attaching, for the court's order shows the following entry:

"Also there is presented to the court the motion and demand of the Commercial Casualty and Insurance Co. and Missouri Pacific Transportation Co. for trial by jury, which motion and demand for trial by jury were by the court overruled and denied, pending decision upon the equitable issues involved and presented in these proceedings. To which action of the court the plaintiff and the intervenor saved exceptions."

It is common knowledge that the New Rules of Civil Procedure are not perfect and do not purport to cover every contingency. Rule 38 if given too strict interpretation would frequently deprive litigants of their constitutional right under the Seventh Amendment, and the courts have given recognition to this fact. Under the circumstances of this case, it would be trivial to deprive plaintiffs of their constitutional right to a trial by jury on the ground that they had waived the right through not complying with the letter of Rule 38 regarding service, when the record so clearly shows that the opposing attorneys did have notice of the demand, heard the demand made in open court, and made no point at any time that they did not have actual notice that jury trial had been demanded.

It was in the Circuit Court of Appeals that the suggestion was made for the first time that the record did not sufficiently show service of the demand for jury trial.

The Complaint Raised Issue of Extrinsic Fraud Requiring Upon Demand, Trial by Jury.

In a case of this kind the relief sought does not act upon the court rendering the judgment; that is, the state court,

but the relief is against the party obtaining the judgment and preventing him from enjoying the fruits of same. (Cf. *Marshall v. Holmes*, 141 U. S. 589, 35 L. Ed. 870; *Arrow-smith v. Gleeson*, 129 U. S. 86, 32 L. Ed. 630; *McDaniel v. Traylor*, 196 U. S. 415, 49 L. Ed. 533; *Simon v. Southern Railroad Company*, 236 U. S. 115, 51 L. Ed. 492; *Chi. Ry. & P. R. Co. v. Callicotte*, 267 Fed. 797, 16 A. L. R. 386, petition for writ of certiorari denied by the Supreme Court of the United States March 7, 1921, 41 S. Ct. 375)

Under the provisions of the statutes of the State of Arkansas, a judgment obtained by extrinsic fraud can only be attacked by an independent suit to vacate or modify the judgment. (See Section 6292, *Crawford & Moses Digest of the Statutes of Arkansas*.)

The facts pleaded and proved disclose extrinsic fraud in that it was fraud practiced outside of an actual, adversary trial, upon a witness of the adverse party, whereby the Missouri Pacific Transportation Company was prevented from presenting fully and fairly its side of the case. (See cases above cited.)

The Honorable Circuit Court of Appeals wrote:

"Were the judgment appealed from based solely on the plea of res judicata, it is possible that the court erred."

This suit was filed June 21, 1940. Show cause ordered issued for June 21, 1940. The respondents, defendants below, filed and the court sustained their plea of res judicata on the 21st day of June, 1940. (R. 29.) This was the sole ground upon which the court dismissed the bill of complaint. On the 25th day of June, 1940, the trial court filed its findings of fact and conclusions of law (R. 30 *et seq.*), in which the court dealt only with the facts relative to the plea of res judicata and concluded as a matter of law that the bill should be dismissed upon the sole ground of sustaining said plea. Objections were filed by applicant (R. 34) that no testimony was heard upon which the court could base findings of fact and conclusions of law. Appeal

was taken (R. 36) to the Honorable United States Circuit Court of Appeals for the Eighth Circuit. Reversal was had and mandate issued on July 10, 1940. (R. 38.) Since the court had sustained the plea of res judicata without the hearing of testimony, the cause was immediately set for July 16, 1940, and the same plea was again presented, and the court after hearing testimony on the plea of res judicata again sustained said plea. (R. 59-64.) It is true that after the court heard the evidence offered in support of the plea of res judicata, he then permitted other testimony bearing upon the merits, whereupon he sustained the plea and dismissed the bill. While the trial court went through the gesture of sitting through testimony it would seem clear that it gave no real consideration to the merits, even though its order disposed of the issues on the merits as well as sustaining the plea.

The Circuit Court of Appeals found that the record does not disclose service of demand for jury trial, in compliance with Rule 38. The brief was filed below and there was no contest on the point that it was asserted that demand was made on the 11th day of July, 1940, and that after the court had granted the application of Commercial Casualty Insurance Company of Newark, New Jersey, to intervene and that after Missouri Pacific Transportation Company was granted leave to and did file its amended pleading, application was made and service then and there had for jury trial, which the court did not grant; and that after the court heard the testimony upon the plea of res judicata on the 16th day of July, 1940, application for jury trial was renewed and by the court refused, and while, due to inadvertence of counsel in preserving the record we are unable to point out service in the Transcript, we do find that it was recognized by the court, as disclosed by the record, page 78, when the request for jury trial was renewed on July 16, 1940, and on page 79 of the Transcript, when the court stated,

"The motion will be overruled as heretofore stated.
Proceed with the testimony."

Wherefore, petitioners pray that this petition for writ of certiorari be granted and that this Honorable Court proceed as required by law and the rules of the court in such cases, and that upon final hearing, the said judgment of the United States District Court for the Eastern District of Arkansas, Little Rock Division, and of the United States Circuit Court of Appeals for the Eighth Circuit be reversed, and this court remand the cause to the proper court with proper and appropriate instructions.

MISSOURI PACIFIC TRANSPORTATION COM-
PANY AND COMMERCIAL CASUALTY INSUR-
ANCE COMPANY OF NEWARK, NEW JERSEY,

BRICKHOUSE & BRICKHOUSE,
R. W. GRIFFITH, JR.,
Little Rock, Arkansas.

LLOYD W. DAVIDSON, JR.,
McCRAW & HOLT,

By

1704 Republic Bank Bldg.,
Dallas, Texas,
Counsel for Appellants.

FRANK H. MYERS,
Of Counsel.

APPENDIX "A".

MISSOURI PAC. TRANSP. CO. V. GEORGE

No. 4-5581.

Supreme Court of Arkansas.

Oct. 23, 1939.

Rehearing Denied Dec. 4, 1939.

BAKER, Justice.

George, who will be referred to by name or as plaintiff or appellee, sued Missouri Pacific Transportation Company, hereinafter called appellant, defendant or company, to recover damages for injuries alleged to have been suffered by him at Gurdon in Clark County in the early morning of August 22, 1938.

Upon a trial there was a verdict and judgment for \$15,000 from which comes the appeal.

Appellant argues that the trial court erred in three particulars: (1) The court erred in refusing to direct a verdict for the defendant. (2) There was no evidence that the defendant was guilty of negligence. (3) That the verdict is excessive.

In the discussion of the matters that have arisen upon this appeal the appellant company has presented its contentions under the three heads stated, including incidental subjects as contributory negligence and other matters pertinent to its defensive position. We shall follow this general trend in our discussion, but the first and second of the divisions will be regarded as consolidated because identical.

We shall state from facts about locations and conditions concerning which there seems to be no controversy. The bus was driven into Gurdon shortly after midnight. It had come from Little Rock, was going south till it reached Main Street in the city when it turned east on the street which is a part of highway No. 53. After proceeding a short distance along Main Street, it turned north across a side-

walk, on the north side of Main Street and stopped or parked 10 or 12 feet north of this sidewalk. It was then headed, just as it was driven in toward the north. Whether this street where the bus stopped was a blind or closed street north of the bus does not appear from the record as abstracted.

The record does show that this was the usual parking place for the bus on such occasions except that there is a contention that at this time it had gone north a short distance more than usual. We fail to see the importance attached to this contention but state it merely in an effort at achieving accuracy. While the bus was parked the driver went to the office to make his report; returning after these duties had been performed, he made ready to leave. If George had not witnessed the arrival of the bus he had observed its presence and knew from years of observation that in a short time it would back out from the place where it had been parked, turn west to highway 67 to continue its journey to the south. He saw the driver as he went around the bus testing the tires with a hammer and realized this was done preparatory to leaving. The driver of the bus as he drove to the parking place, or very shortly thereafter observed George standing on or near the sidewalk but east of the point of crossing used by him on that occasion. He was still at this same place leaning against a pole "When the driver returned to the bus." It is not clear whether the driver meant to indicate by his statement the time at which he came back from the office or when he had gone around the bus testing the tires. He had just said the bus was 35 or 40 feet long. The materiality of this matter may become important when time to make this inspection is considered. In doing this he went within 10 or 12 feet of George where he was standing at the post.

When the bus backed out George was hit or at least fell back away from the bus toward the east. He cried out at the time "What do you mean?" This cry was heard by the driver of the bus and was the first he knew of the alleged accident.

We think the foregoing is a statement of the material, undisputed facts showing the setting a few minutes, perhaps a few seconds, before alleged accident occurred.

We shall now state the relative contentions of the parties and our conclusions thereon.

George was a deputy sheriff, constable and night watchman. He had been such watchman for a long time. That was the reason he met the night bus. George's statement is to the effect that as he looked toward the west from where he stood at the pole near the rear of the bus, he saw the freight depot lighted up where men worked every night moving and transferring freight. His attention was attracted to some matters he thought he should investigate. He started west along the regular walk-way when he was struck by the bus backing rapidly from its parking place about 250 feet south of the depot. He says no horn was sounded or other alarm given by the driver. When he had looked before proceeding along the walk to the rear of the bus a moment before it was still standing. In regard to the noise made by the motor when starting up he said he did not notice it, and believed it had not been stopped during the parking interval. Wilkerson, the driver, was positive he had stopped the motor before going to the station 250 feet away and says he was instructed to shut off the motor when it was necessary to stop as long or longer than two minutes, that the motor roared when starting up because he always raced it momentarily. The driver says he backed out slowly. He did not know that George had moved from the position near or at the pole till he heard the cry "What do you mean?" While there is other testimony tending to support or contradict evidence adduced as above set out, we shall content ourselves with the declarations of the two principal actors.

Since we may not determine facts as will be set out later, the principles of law involved and application may be determined as accurately from the factual statement above as if the whole record or bill of exceptions were dumped into our laps.

(1-3) May we hold as a matter of law that George was guilty of contributory negligence? It is urged most forcefully that he walked behind this moving bus. Such is not the evidence when considered in the light most favorable to support the verdict of the jury. Before he started to cross he had looked and the bus was standing. True, he had no right to block the way, by standing therein, but the relative and reciprocal duties of pedestrians and vehicles are equal and each should look out for the other and their conduct in the use of streets under the prevailing conditions determines negligence or the lack of it. Since it may not reasonably be denied that George had a right to be upon the sidewalk under the conditions stated by him, the question of his negligence was properly one to be determined by the jury, and not to be declared dogmatically by us a matter of law.

Appellants cite an authority defining the duty of a pedestrian standing in a place of safety to remain in such place till he shall by some movement clearly demonstrate his intention to depart therefrom. *Schulze Baking Co. v. Daniel's Adm'r*, 271 Ky. 717, 112 S. W. 2d 1011.

We think the declaration most probably is sound in principle when applied to the particular case but cannot see how it may be applied herein. Appellants say: "The rights of pedestrians and vehicles are reciprocal and each must anticipate the movements of the other." Learned counsel's statement need not be fortified by citations of authorities.

May not the jury have reasonably determined that George's statement as to how he was injured was substantially true? Wilkerson, the driver of the bus, did not see him. That is the reason for the citation of the above case from the jurisdiction of Kentucky. The presumption invoked was to supply Wilkerson's failure to look or observe just where he was driving when he backed the 35 or 40 foot bus into Main Street, over a walkway used by pedestrians.

Let it be understood that we do not suggest that the

driver should not have backed out or across the walk. He may have been on a blind or closed street, but even if the street were open he might properly have backed using and employing care commensurate with the risk at the time and place. May not the jury have found that according to his own evidence he assumed the way was clear without looking to see, and backed out hurriedly?

Then there is the question whether he gave any signal? The facts are in sharp conflict. The jury decided this matter. The law is well settled and recognized. *Texas Motor Co. v. Buffington*, 134 Ark. 320, 203 S. W. 1013.

In the cited case there is a well stated, clearly announced declaration of law by the late Chief Justice McCulloch. It not only sets out the duty of the driver backing a car into a street, but in addition it is authority for the conclusiveness of the jury's verdict in settling the question therein of plaintiff's contributory negligence. Numerous authorities are cited to support the text. These are all decisions from our own court. For that reason we think it unnecessary, if not pedantic, to resort to decisions of foreign jurisdictions.

In support of the verdict we have already discussed the facts as they could or might have been found by the jury. With some degree of reluctance we again approach "a vexed and vexing" proposition, the conclusive effect of a verdict.

The late Mr. Justice Butler, whose scholarly attainments and industry might well be emulated, gathered a list of the well considered cases and set them forth in the opinion prepared by him for the court deciding *Missouri Pac. Transp. Co. v. Sharp*, 194 Ark. 405, 108 S. W. 2d 579. Just a little later his conclusions were again approved in *Missouri Pac. R. Co. v. Henderson*, 194 Ark. 884, 889, 110 S. W. 2d 516. I have decided not to copy anything from either of these opinions, lest some one interested in the subject might deem my selected part as the vital portion and for that reason fail to read these opinions in their entirety. It is remark-

able with what frequency learned counsel, zealous in their advocacy, present this matter in some new phase although there has been practical uniformity in all decisions. Indeed it has come to us from our earliest recorded decisions. *Hynson v. Terry*, 1 Ark. 83.

(4) It was alleged as error in this last cited case that the trial judge "charged the jury upon matters of fact which is expressly prohibited by the Constitution." This provision of the constitution of that date is present in our constitution of 1874 (article 7, § 23) and under well recognized principles as announced by a long line of decisions we must be deemed to have adopted the earlier decisions interpreting that provision of the constitution when we put the same language in the constitution of 1874.

(5) Avoiding a further superfluity of words which would bring no corresponding benefit, we must content ourselves with the announcement that from that earliest date to the present time this provision of our organic law has remained intact and unimpaired. So now when we are confronted with substantial evidence found to be true by verdict of the jury, the effect of which evidence does not violate or contradict any well known natural law or principle, we may not feel at liberty to disregard such verdict.

(6) In this case if we were triers of facts we might believe appellee to be a chronic plaintiff seeking by devious ways and methods to extort by "hand-made" processes money from those with whom he came in contact, and although we might feel that the verdict is contrary to preponderance of the evidence, yet we are powerless in the face of this constitutional provision as construed throughout the years to enter that field so peculiarly belonging to the jury. If this system is faulty and defective the remedy lies with the people and not with the Supreme Court. It must appear then that argument upon the weight of evidence, upon credibility of witnesses, must properly be regarded as argument properly to be made to the jury and finally to the trial court to correct the alleged errors of the

jury. The verdict of the jury so rendered and approved by the trial court forecloses our consideration except to determine whether it may be supported by evidence of substantial nature.

(7) We now dispose of the last proposition argued by appellants upon this appeal. They urge that the verdict is excessive and was rendered as a result of passion and prejudice. We think it might well be conceded that no passion and prejudice are shown unless same appear from the amount of the recovery. It is argued that the testimony of the physician, who describes the alleged injuries, should not be believed. That it is corruptly false, demonstrated by X-ray pictures which were charged to have been made by trick photography. Forceful argument, vigorous denunciation and pointed invective are very strongly persuasive that this may be true. We are told by appellants that the plaintiff has suffered no real injury. That the evidence indicating the almost total impairment of certain bodily functions, which impairment will remain as permanent lesions, was knowingly untrue. This charge is far reaching in its implications. If it was so apparent that the correctness of appellant's charge is true in this regard, the trial judge must have been as well informed of its correctness as appellants and their learned counsel. The evidence that this condition prevailed must rest solely, at this time, in the zeal and advocacy of counsel who present the issue. Again we are forced to assert that these arguments are appropriate to have presented the matters in controversy to the jury and trial judge.

We evade no responsibility, in this respect; it does not reach us. If the appellee's testimony and that of witnesses, including the doctor, was believed, the verdict is supported by evidence of a substantial nature. That being true, necessarily the charge of passion and prejudice must be deemed as eliminated. This is a hard case; the kind that makes shipwreck of the law.

Affirmed.

GRIFFIN SMITH, *C. J.*, and McHENRY and HOLT, *JJ.*, dissent.

FRANK G. SMITH, *J.*, concurs in the result.

GRIFFIN SMITH, *Chief Justice* (dissenting).

J. C. George, plaintiff below and appellee herein, at the time of the alleged injury, held commissions as constable and deputy sheriff, and in addition was night watchman in the town or city of Gurdon. He had been so engaged for more than seven years. The so-called "accident" which formed the basis of his suit in the Clark circuit court, with a resulting judgment for \$15,000, occurred August 22, 1938.

East Front Street in Gurdon runs north and south by the Clark County Bank between the business section and the railroad property. There is a small park and a monument. On either side of the park there is a driveway wide enough for cars to pass. The driveway leads from Main street to the passenger depot. Main street runs east and west and leads to Highway No. 67.

On the night in question the southbound bus came in on the highway, turned into Main street proceeding east, then turned to the left into the driveway and stopped 10 or 12 feet from the walkway used by pedestrians in traveling from the Clark County Bank environment across the railroad to the business section on the west side.

Appellee contends that between 1 and 2 o'clock of the morning of August 22 he had completed his "rounds" and had just reached the bank when the bus drove in. While the bus was stationary at its stopping point, appellee walked to a light pole with which he was familiar. While so occupied, appellee claims he saw some one going in the direction of the freight depot, southwest of the point where he was standing. While watching the person or persons he says he thought he saw, he entered into conversation with himself, thereby informing himself that he would cross the tracks and go to the freight house, "and maybe see who it is."

Appellee testified that he then "looked and tried to figure everything was clear." Continuing, he said: "When I started out, this bus backed up without any notice whatever and didn't sound a horn or anything else and slammed into me and I was in the middle of it before I saw it, and it struck me on the leg a little bit and I threw my hand up and gave myself a shove. . . . I fell flat and wiggled out from under it some way."

The driver of the bus, he says, and some one else, carried him to a hotel. A doctor was called and gave him a "shot", and he was taken home.

Since that time, appellee contends, he has been in bed most of the time. Was injured in the back. Insists his left leg is practically paralyzed—"can use it a little, but seems like it gets worse all the time." Was in perfect health before the injury. Had never been sick, according to his original direct testimony, except an attack of pneumonia 25 years ago.

John Smith, a WPA worker, who says he was in Gurdon the night appellee asserts he was injured, corroborates appellee's statement as to the manner in which the so-called "accident" occurred. He testified that when appellee was walking from the bank corner the bus started suddenly and backed out, "and I seen it knock him over." On cross-examination the same witness said: "Listen, he was behind the bus where I could not see it." This witness says he heard the bus motor start. Later he testified: "The bus came up on this side of me and kept me from seeing him."

This witness admitted he had never been in Gurdon before at that time of night; that he did not have a car and had to walk home, a distance of two miles. He did not have a watch, but "figured" the accident happened about midnight. Did not remember about any trains passing, and could not name a single person he saw in town that night.

Dr. R. L. Bryant testified that he made an X-ray picture of appellee September 9, 1938, "and have seen him three

or four times since then." The doctor's opinion was that appellee had a back injury. He found "subluxation of the joints that form the left sacroiliac. Sacroiliac seems to have been injured some on the left side."

In explaining an X-ray picture to the jury, the doctor said: "This does not show up plain. It can be seen better on this side . . . Normally it is a fixed joint on the picture, and when there is a separation it widens that line." A second picture was introduced, which the doctor said showed a fracture of the fifth lumbar vertebra—the last one that joins the sacrum. The "body of it" was fractured on the right side, the left side being normal.

The only time witness had seen appellee was when the latter came to his office to have the X-ray pictures made. Prescribed some medicine for him October 10, 1938. When appellee called for the examination, he was on crutches and was "hopping on his left leg, and said he had a severe pain in his back."

Dr. Bryant admitted there was a "regular method of treating cases of this kind in a cast," but had not undertaken anything like that. The patient was being treated by Dr. Green. Dr. Green did not testify.

R. M. Davidson, Missouri Pacific conductor, observed the bus when he was $2\frac{1}{2}$ blocks from it—800 feet, he estimated. His attention was attracted by the noise of the motor in starting: "It was making all the racket in the world." Witness saw the bulk of a man walking toward the rear end of the bus. "It looked like he made two or three steps and the next thing I saw was the outline of a man down in a sitting position leaning against the pole . . . When the man walked out toward the bus he was walking slowly like he was going to wave at somebody on the bus."

It is in evidence otherwise that before starting, the driver assisted two or three passengers on, and walked around the bus with a hammer tapping the tires to see if they were all "up."

Dave Bryant noticed the bus standing in the driveway. He "saw there a few minutes, watched the passengers get on, saw the driver turn off the inside lights, heard the motor start, and also heard two or three sounds of the horn." The bus started backing out slowly—about the speed a man would walk—and came on back about its own length and stopped, then drove back into the driveway where the passengers were unloaded. No one came to the back end of the bus, and the back end of the bus did not strike anyone. A few minutes later, after he had gone to the freight office, some one reported that Jesse George had been hurt. Witness went to the Commercial Hotel and asked George what the matter was. George replied that he had been watching two boys he thought were trying to break into box cars; that he started walking toward the freight depot, and the bus struck him. "He stated that his mind was on these two fellows, and he was paying no attention to the bus."

John C. Taylor saw a man standing by the light post near the rear of the bus. When the bus started to back out witness was sitting about the fourth seat from the front on the right side, facing the front. He heard the motor start, making quite a noise. Was looking back as the bus started. "As the bus was backing up slowly and as the bus came back and almost—probably just the back corner of the bus was even with him—he got within a step or two of the bus (I could not say exactly, but very close to the bus) and he threw up his hands and fell over on his side and back." Witness was positive George never touched the bus; was looking at him constantly. George was about two steps from the bus when he put up his hands and staggered back. That put him back almost to the pole he was leaning against and that is where he was lying when the driver got out and went to him. The bus was not going any faster than a man could walk. Witness was a passenger who had come in on the bus, and while it stopped he got out to rest his legs. On cross-examination he said: "Mr. George threw up his

hands and staggered back and fell on his side and back and said, 'What do you mean?' "

George W. Dovers, a passenger who got on the bus at Gurdon the night of the alleged injury, arrived there on the train at 11 o'clock. While walking around he first saw George standing by the pole. This was about 20 minutes before the bus came in. "After going to the Rex Cafe, I returned with two other men to get on the bus. I saw Mr. George standing at the same place—in the same position by the pole. After getting on the bus I was seated on the left side about two seats back of the driver. I looked back through the window on the right side of the bus when it started backing out. I saw the man who was standing by the post start walking toward the bus just as the bus started backing. I would judge that he got within two or three steps (of the bus when) he fell backward. He never was very close to the bus. I was looking directly at him and could see him from the waist up, but could not see his feet . . . Before the driver started the bus he counted his passengers, switched off the inside lights, and started backing like they always do. I heard the motor start, and do not know of anything around there that could have kept (George) from seeing the bus back out . . . After the (incident) Mr. George stated that he was walking west looking down toward the freight depot and the first time he saw the bus it was right on him and he put up his hands to push himself away from it, and fell."

Witness examined the side and back of the bus and could not see any prints where anyone's hands had touched the bus. Mr. Bradley verified what other witnesses had said about the conduct of the driver in testing the tires with a hammer. After the bus got in slow motion George "walked out from the post and came toward the side of the bus—something like five or six feet from where I was sitting. (George) would first look toward the front of the bus and then back behind (it). He was walking terribly slow toward the bus and got within about two and a half or

three feet of it, (then) put up his hands and staggered back and fell. I saw George when he first started from the post and (saw him looking) toward the bus."

Mrs. Bradley testified substantially as did her husband, adding: "The bus driver counted the passengers and took something and tapped the tires and said 'all aboard.' He then turned the (inside) lights off, but I do not remember whether he sounded the horn. . . . Mr. George, who had been standing by the post, watched the bus, then (began walking toward it), looking at the driver while he was walking. When he got within a foot or a foot and a half of the bus, he threw up his hands and started staggering backward and fell, kind of on his side. His head and shoulders after he fell were about even with the post."

R. G. Wilkerson, driver of the bus, testified that when he stopped at Gurdon the engine was shut off. Had been driving to Gurdon three or four years, and knew George was night watchman. On the night in question he noticed George standing near or leaning against the post. Had seen him at the same place before. Witness left the lights burning inside the bus (while it was stationary). Also, the tail lights were burning. Attended to his routine duties and upon returning from the depot saw George still standing by the post. He then checked passengers to see that they corresponded with the tickets, took a hammer and tapped the tires to see that they were all "up"—which is the last thing done before leaving a station—then got in the bus, turned off the inside lights, started the motor, sounded the horn and began backing out about as fast as a man could walk. He had pulled up 10 or 12 feet clear of the sidewalk when he came in. The only person around the bus was Mr. George, leaning against the post, and George was 10 or 15 feet from the back (of the bus). There was nothing to keep George from knowing the bus was loaded and ready to start. The motor made considerable noise in the process of acceleration. "When I was backing out, and just as the door of the bus got about even with the post, I heard some-

one say, 'What do you mean?' I then saw Mr. George over there on the ground within a few feet of the post and about 10 or 12 feet from the bus. I pulled up a little and got out. Mr. George said I had almost backed over him. I asked him how that happened, when he was standing back by the post, and he said: 'I started to walk across there and the bus was almost right up in front of me before I noticed it.' He then stated that he put up his hands against the side of the bus, and shoved himself back, and fell. I wanted to get a doctor, but George told me not to bother; that he would get some of the boys to take him home. He finally agreed to walk over to the hotel, I holding one arm, and another man holding the other. He told me the bus was passing along in front of him before he noticed it and that he had put up his hands unconsciously."

Dr. J. T. McClain, who had known appellee 25 years, was called to the Commercial Hotel the morning of August 22. "George was complaining of his left side and back. I gave him a hypodermic and asked him if he thought he could go home. He replied that he believed he could. I drove him to his home, where he got out of the car unassisted and walked up the embankment to his house. . . . He smelled pretty strong from the effects of liquor. . . . I called on him the next morning. There were no marks or abrasions on his skin—no evidence of an injury except that when he would be touched at certain places he would say it was hurting. There was no discoloration of any kind. Saw him again that afternoon and he was in about the same condition, except that he had gotten some whiskey and was resting better. Had been around him on his beat at other times and had smelled the odor of liquor on his breath." On cross-examination Dr. McClain said: "He smelled pretty strong of liquor that night and he talked a little like a drunk man and had all the movements of a drunk man."

Dr. Theo. Freedman, of Little Rock, examined appellee October 3, 1934, in collaboration with Dr. Smith, for an

alleged injury then complained of. No injury was found, but the X-ray disclosed an arthritis condition, evidenced by "spurs" which come out from the spinal process. There was also decrease in the space of certain vertebra in the lower part of the back.

Dr. D. A. Rhinehart, an X-ray specialist, testified he graduated from the School of Medicine of the Indiana University in 1913, taught anatomy in medical schools six years, and has been doing X-ray work for 19 years. Examined some X-ray pictures October 3 and 4, 1934 showing the condition of appellee's back. They showed a small spur on the right side of the lumbar vertebra, and a space between the last or the fifth vertebra on top of the sacrum. The condition was one usually due to arthritis.

Witness was then shown the second X-ray picture introduced in evidence in the instant case as an exhibit to Dr. Bryant's testimony. He stated that he could not see any fracture of the fifth lumbar vertebra, and that the patient (for the purpose of taking the picture) was turned slightly to the left. If a subject is thus turned, the picture appears different. "This man was twisted a little, (and) the picture does not show any injury to the sacroiliac joint, nor any fracture. The reason one line in the picture shows larger on one side than on the other side is due to the way the picture was taken."

Dr. C. K. Townsend also examined the picture in question, stating that it did not show any fracture, but that it was evident the exposure was taken at an angle.

Dr. Joe F. Shuffield testified that, although appellee complained generally, and particularly of his back, etc., etc., he could sit down and lean back in a chair as well as a normal man could. "You cannot see or feel anything wrong with his back, and the muscles are about normal size. We X-rayed him and could not find anything wrong with the joints and bones in his back." Had examined the Dr. Bryant X-ray picture and saw nothing wrong with the patient except the indications of arthritis heretofore re-

ferred to. He testified positively that Dr. Bryant's picture was taken at an angle. Took a specimen of appellee's blood to Little Rock for analysis. It showed syphilis. This disease could cause paralysis. The nervous system and the blood vessels would also be affected. Syphilis could cause paralysis of one leg without affecting the other. Appellee does not have any symptoms that could not be caused by syphilis.

Dr. M. J. Kilbury, clinical pathologist, who examined appellee's blood, testified that three tests were used—Wasserman, Kahn, and Kline. All, he said, showed the presence of syphilis in the blood as strongly as is known—"4 plus positive."

Following the testimony offered by appellant, appellee was recalled and denied having been under the influence of liquor when injured. He denied Dr. McClain's statement that he (appellee) walked up the embankment at his home when the doctor drove him there from the hotel. He said that the paralysis occurred immediately after contact with the bus; contended he was crippled and could not stand alone; denied he had ever had a venereal disease, and insisted there was nothing the matter with him prior to the incident of August 22d.

The prevailing opinion, in its statement of the facts and in its declaration of the applicable law, is the consensus of three judges of this court. A fourth concurs in the result.

Aside from inconsequential testimony the jury's verdict, in respect of appellant's negligence and consequent liability, rests entirely upon the testimony of appellee—the vitally interested party who asked that he be compensated to the extent of \$50,000, and who has recovered \$15,000. True, the witness, Smith, made certain statements; but, on cross-examination, he admitted that he was not in a position to see the transaction. What he says, therefore, is of but slight importance. The bolstering potentiality of his words is of no more significance than would be the voice of a stranger crying in the wilderness of would-be helpful-

ness. Such testimony is no more substantial than conversational comment subscribed for its record benefit—for the alimentionation it was intended to afford, but which it does not supply. It is the type of testimony no passion-free jury should accept as substantial, and the verdict is one no discriminating trial judge should have believed was sustained by preponderance of the evidence.

Let us further examine the record to determine, as the trial judge should have determined, where the weight of testimony lies.

Although we are not permitted, in this court, to reverse solely because the weight of evidence does not sustain the verdict, we may, and we should as a matter of judicial duty, analyze and particularize those cases wherein every rule of reason and all of the canons of construction point to a failure upon the part of a trial judge to apply that law which such judge, under his oath of office and the Constitution, is affirmatively required to administer.

In 1929 appellee claimed he was injured. Suit was filed in Clark county against the Gulf Refining Company. Appellee was then a carpenter, assisting in the construction of a building. Among his other duties, as he set out in the complaint, the then plaintiff was directed to carry heavy doors, and “ . . . between the place where plaintiff was directed to work in building the doors, and the place where the doors were to be carried and hung, there was a highway, along the side of which was a deep ditch . . . with a levee embankment alongside.” The complaint then alleged that plaintiff was directed by his foreman to carry the doors across the highway and across the ditch and levee, and that, “in view of the weight of the doors and of the manner in which the same had to be carried, and of the few men directed to carry the same, and of the depth and width of the ditch and size of said levee and of the smallness of the expense of constructing a bridge or safe passage-way across the ditch and levee, it became and was the duty of the defendant, in the exercise of ordinary

care for the safety of the plaintiff, to have caused a bridge or some other safe way of passage to be constructed across the ditch and levee."

It was then recited that by reason of the negligence of a fellow-servant, the weight of one of the doors was suddenly thrown upon the plaintiff, causing the following injuries: The tendons connecting the muscles of the plaintiff's back to the backbone were jerked loose from backbone and the muscles were torn loose from the tendons. A great strain was suddenly forced upon the abdominal muscles of the plaintiff, and his nervous system was thereby shocked and he was otherwise strained and injured so that ". . . plaintiff's back and muscles and tendons thereof have been permanently and seriously injured and the strain upon the abdominal muscles caused the plaintiff to suffer a serious and permanent inguinal hernia, and has also caused the plaintiff to suffer a serious and permanent injury to the plaintiff's nervous system, and that each and every one of the said injuries has so affected the plaintiff that he is now and will always be in a weakened condition."

That suit was settled for a comparatively insignificant sum and the "permanent" nature of the injuries seems to have disappeared.

In 1933 appellee fell over a railroad speeder on the Main street crossing at Gurdon. Then, as in the instant case, he was "making his regular rounds." In describing this accident he said: "I was crossing from the west side to the east side when all at once when I got over the main line about 10 or 12 feet from the main line the first thing I knew I ran into this speeder. When I did so I fell and the speeder turned over with me . . . Something struck me and injured my back." The speeder was not in motion until appellee aggravated it. His conclusions as to this injury were that "My back was strained and may bother me as long as I live." He then added, by way of complimentary conversation, that "The settlement I made on account of injuries at Mena was a friendly settlement. I never have

had any suit against any railroad or any other corporation on account of any personal injuries." The Gulf Refining Company was not, in contemplation of the complaining party, a corporation, notwithstanding the character of its corporate organization.

As late as 1935 appellee wrote the Missouri Pacific, demanding settlement for his skirmish with the speeder. In the letter he said: "It would be much better for all concerned if you would (reconsider my claim). I could get medical treatment now and I sure do need it."

In November, 1933, he ran his wife's car into a train at the Main street crossing in Gurdon and claimed damages for the injury.

On direct examination appellee was asked:

"Q. Mr. George, what was your condition before you received this injury? A. I was in perfect health.

"Q. How long had you been in perfect health? A. Well, I never was sick. I had a spell of pneumonia about 25 years ago, and that is the first time that I had ever been in bed more than two days at one time in my life.

"Q. You had been in bed other times for what? A. The mumps."

On cross-examination there were the following questions and answers:

"Q. Mr. George, you said before this accident occurred that you were a well, strong, and able-bodied man. A. Absolutely.

"Q. In fact, there had never been anything the matter with you except some colds? A. I had a spell of pneumonia 25 or 26 years ago.

"Q. That was all? A. Yes, sir."

That these statements were not true was developed by further cross-examination, as shown, *supra*.

This case was tried on the theory that appellee deliberately walked from the telephone post to a position near the bus, timing himself to contact as the bus backed out,

and then put his hand on the bus, or toward it, and simulated injury by falling and crying out.

I am somewhat doubtful of the correctness of this theory. On the contrary, I think the substantial evidence—in fact, all the evidence except appellee's statements—shows that appellee absent-mindedly walked from his place of security just as the bus started; that when appellee was within 2 or 3 feet of the bus he suddenly realized his position, and perhaps fell as a consequence of the sudden impulse that impelled him to self-protective action. Certainly his own negligence in walking out behind the bus as it started was the proximate cause of his injury, whatever the injury may have been.

Everybody concedes that the motor was running when the bus began backing out. Whether it had been left idling while the bus was parked (as appellee intimates) or whether it was started when the driver undertook his departure—in either event we know, as a matter of common knowledge, that a bus motor occasions an unusual noise. That, alone, was sufficient to warn appellee that the bus was in motion, or was about to start. We have held, in dozens of cases, that testimony of a person near a railroad that he or she did not hear the bell ring or the whistle blow, and that the witness' hearing was not impaired, is admissible to establish the claim of a plaintiff that statutory signals were not given.

There is no suggestion that appellee's hearing was not of the best, that his eyesight was not good, or that he was unfamiliar with the premises. On the contrary, it was his custom to meet the bus. He knew what its ordinary movements were, knew that after loading it would back out, and knew it was dangerous to walk immediately back of it at such a time. Even though it be held that appellant was guilty of negligence in not sounding the bus horn (if such be true), still appellee's own action in placing himself in the position of peril was the immediate cause of his injuries.

This brings us to a discussion of the credibility to be given appellee's testimony. Certainly, if there is substantial evidence to support the verdict, and if appellant was guilty of negligence, and if appellee was not equally contributorily negligent, a judgment for a sum commensurate with the injury should not be denied. With the exception of Smith's effervescing statements, all of the witnesses disagree so radically with appellee that one or more of three things appears: Either appellee was deliberately falsifying, or he was intoxicated to the extent that he did not know what his actions were, or all of the other witnesses are perjurers. Some of them are wholly disinterested. They merely happened to be passengers on the bus, and incidentally saw the transaction. In substance, they agree that appellee, after the bus started backing out, or coincident therewith, walked from a place of safety into one of peril. Weighed against the unanimity of this evidence, we have the statement of appellee who says he was looking for possible burglars; that before starting across the intervening space he looked to see that all was clear, and that the bus backed out and "slammed into him."

In his direct testimony relating to the previous condition of his health, appellee was untruthful. His misstatements are glaringly perverse; or, in the alternative, he undertook, for an anticipated compensation, to deceive all those with whom he communicated with respect to his former injuries and ills. On cross-examination he asserted that for 25 years there had "never been anything the matter with him" except a spell of pneumonia, and possibly measles. And yet, as late as 1935, we find him petitioning the Missouri Pacific Company to reopen and reconsider his claim for injuries alleged to have been received in connection with his skirmish with the speeder; and the reason advanced was that of need for treatment.

In a statement dated May 11, 1930, referring to the Mena injury, he said: "I went back to work on the job and did what I could, but was unable to do any heavy lifting . . .

After we finished that job . . . I came back to Gurdon and my back has hurt me since almost continually."

October 17, 1933, in a signed statement, he said: "My back never has gotten well and bothers me now." Again, in the same statement: "I have lost several nights (from) work on account of my injury. I manage to hold the job, but it is painful to do so. Sometimes my back does not pain me and some times it does, but when I step in a depression or go to step up on anything, it hurts my back."

September 12, 1934, in another statement, appellee said: "Since I made my original statement Mr. Pegg in June of this year (with reference to the speeder accident) my condition has not improved and I am still very nervous—more so at some times than at others."

Assuming appellee truthfully delineated his condition in making these statements—and there is no testimony to the contrary other than the want of credibility to be placed in the witness himself—it must follow that he was not truthful in November, 1938, when he undertook to convince the jury that prior to August 22d of the same year he was in perfect health, and had been so for 25 years.

We have, then, the situation of an interested witness who has impeached himself—a witness whose objective was to recover \$50,000, yet a witness branded by scientific experts as syphilitic; a witness who did not even deny having syphilis, although in rebuttal he did disclaim ever having had a venereal disease. Syphilis, being a blood disease, could not be included in appellee's denial, although frankness here suggests the concession that he probably thought he was making a denial.

Against appellee's own repeated declarations of injury in 1929, against his assertions of aggravation in 1933, against the testimony of competent and disinterested witnesses who negative the accusation of negligence upon appellant's part, against Dr. McClain's testimony that appellee, when attended at the hotel immediately after the incident, "Smelled pretty strong of whiskey, talked a little

like a drunk man, and had all the movements of a drunk man"; against Dr. McClain's statement that appellee, when driven home, got out of the car unaided and walked up an embankment to his home—in utter disregard of everything suggested by reason and common sense in connection with the affair—we, as members of the appellate court, recline supinely behind a judicial dogma and permit a scandalous miscarriage of justice to be consummated by virtue of a jury's apparent acceptance of testimony so glaringly insufficient as to shock the sensibilities of thinking people.

As was stated by Mr. Justice Riddick in *Singer Manufacturing Co. v. Rogers*, 70 Ark. 385, 67 W. 75, 68 S. W. 153: "The rule established in this court is that, even where there may be some conflict in the evidence, a new trial will be granted where the verdict is so clearly and palpably against the weight of evidence as to shock the sense of justice of a reasonable person; and the evidence here, we think, calls for this application of this rule."

In *Catlett v. St. Louis, I. M. & S. Railway Company*, 57 Ark. 461, 21 S. W. 1062, 1063, 38 Am. St. Rep. 254, Chief Justice Cockrill said: "The test is as follows: After drawing all the inferences most favorable to the verdict that the evidence will reasonably warrant, is it sufficient in law to sustain the verdict?"

These declarations of law as approved by the entire court were discussed on in a dissenting opinion written in the case of *Seaman Store Company v. Bonner*, 195 Ark. 563, 113 S. W. 2d 1106, 1114. In commenting upon the action of a majority of the court in sustaining an unusually large personal injury verdict, the writer there said:

"We are now no longer shocked. We employ the verdicts of juries as shock absorbers. Certainly no one questions the jury's exclusive rights to pass upon the truth of controverted issues of fact. But it does not follow, because juries have this right, that they have the right also to return any verdict which fancy, passion, or prejudice may suggest.

"The rule has been too often announced to be questioned that the verdicts of juries will not be disturbed on account of a finding of fact where there is substantial evidence to support that finding. Our reports are full of such cases, of which I have written a number, and I do not inveigh against or question them. But it does occur to me that there is a growing inclination on our part to shirk our responsibility in reviewing jury trials. We are becoming too prone to wash our hands of responsibility by saying that while a particular verdict should not have been returned and that our own sense of fairness and justice is such that we would not have done so, yet we are concluded by the verdict of the jury.

"The rule is firmly fixed by the numerous decisions of this court that we may not reverse a judgment as having been rendered upon insufficient testimony where the verdict upon which the judgment was rendered is supported by substantial testimony. . . .

"But are we without power to review this testimony? Have we no function to perform in passing upon its legal sufficiency to support a verdict which may have been, and in many cases is, returned, not by the unanimous vote of the jury, but by the vote of only three-fourths thereof? I say we have a duty, of which we are not relieved by the fact that a verdict has been returned. On the contrary, this duty is not imposed upon us until we are called upon to review that verdict. We then have that duty to perform, and can only discharge it by determining, as a matter of law, whether there is a failure of proof or whether the evidence is legally sufficient to warrant the verdict."

The writer of this opinion adheres to the view (presented by a philosophy often discussed but seldom analyzed) that human rights are paramount to property rights; and in litigation where these rights are in conflict, sympathy for the so-called "underdog" invariably suggests restitution or compensation in favor of the plaintiff where a doubt exists as to relative issues. This adherence to a philosophy of right, however, does not go to the

extent of sanctioning perjury and wrecking the rules by which society is maintained in order that one who suddenly finds himself in misfortune may place his hands in the pocket of another and help himself to the abundance he conceives to be deposited there.

It is my view, concurred in by Mr. Justice McHANEY and Mr. Justice HOLT, that the instant case is without merit. The judgment should be reversed and the cause dismissed.

APPENDIX "B".

MISSOURI PACIFIC TRANSP. CO. v. GEORGE

No. 4-5950

Supreme Court of Arkansas

Rehearing Denied June 10, 1940.

FRANK G. SMITH, *Justice*

The facts out of which this litigation arose are recited at some length in the majority opinion and at greater length in the dissenting opinion rendered in the case of *Missouri Pacific Transportation Co. v. George*, 198 Ark. 1110, 133 S. W. 2d. 37. As appears from those opinions, the plaintiff George recovered a judgment for \$15,000 to compensate a personal injury alleged to have been sustained when a bus, owned by the defendant transportation company, was backed by its driver and employee against plaintiff. The suit was defended upon the ground that the injury did not occur in this manner, and, if so, that plaintiff's negligence contributed to his injury and defeated his right to recover.

The suit was also defended upon the ground that plaintiff had sustained no serious injury. It has at all times been the theory of the defendant transportation company that plaintiff "faked" his injury and was a malingerer.

However, it was the opinion of the majority that these were questions of fact for the jury, and that the testimony, viewed in the light most favorable to the plaintiff, was legally sufficient to sustain the judgment rendered, and was sufficient also to sustain the amount of the recovery.

After the affirmance of this judgment, a motion for a new trial upon the ground of newly discovered evidence was filed under the authority of § 1536, Pope's Digest. The procedure to be followed in such cases provided by §§ 1540 and 1541, Pope's Digest, as complied with.

The provisions of these statutes have been frequently invoked, and in their application new trials have been ordered in some cases, and denied in others.

The early case of *Robins v. Fowler*, 2 Ark. 133, announced the showing which the complaining party would be required to make to obtain this relief, these being: "1st. The testimony must have been discovered since the trial. 2nd. It must appear that the new testimony could not have been obtained with reasonable diligence on the former trial. 3d. It must be material to the issue. 4th. It must go to the merits of the case, and not impeach the character of a former witness. 5th. It must not be cumulative."

The recent case of *Missouri Pacific Transportation Co. v. Simon*, Ark., 140 S. W. 2d 129, April 22, 1940, was, like the instant case, one in which the provisions of § 1536, Pope's Digest, were invoked after the judgment had been appealed to and affirmed by this court, and, in denying that relief, the opinion quoted from the case of *Robins v. Fowler*, *supra*, the language which we have copied.

In support of the motion for a new trial the affidavit of a boy named Claude Denson was offered, which was to the effect that shortly before the accident resulting in plaintiff's injury occurred, he had heard plaintiff say that he was going to "fake" this injury and recover damages from the transportation company.

Much testimony was offered at the trial from which this appeal comes, and the young man, Claude Denson, was examined and cross-examined at length. He admitted making an affidavit to the effect that he had heard plaintiff George say that he was going to "fake" an injury; but he admitted making another affidavit to the effect that his former affidavit was false, and, as a witness at the hearing from which is this appeal, he testified that his first affidavit was untrue and he denied having heard George say that he intended to "fake" an injury. This young man is by his own admission a confessed perjurer, and it is inconceivable that any credit would be given to his testimony if

he should upon another trial repudiate the testimony which he gave at the hearing of the motion for a new trial.

There was also much testimony tending to show that George had not sustained any serious injury, this consisting chiefly in his movements around his home when he thought he was unobserved. There was testimony to the effect that he was seen moving chairs in his home and arranging furniture in his house and walking on the streets in a manner indicating that he was not seriously injured. This testimony was categorically denied. George testified that he could not walk without his crutch or other support, and that he had used chairs in his home for his support in moving about the house.

It would protract this opinion to an indefinite length to review the testimony, and, without doing so, we announce our conclusion to be that the trial court did not abuse his discretion in finding that the testimony was not of such character and cogency as might affect a change of the verdict previously returned.

We have held in numerous cases that motions for a new trial on account of newly discovered evidence are addressed to the sound discretion of the trial court, and that this court will not reverse for failure to grant a new trial unless an abuse of such discretion is shown. *Forsgren v. Massey*, 185 Ark. 90, 93, 46 S. W. 2d 20.

The trial court found also that due diligence had not been used in the discovery of the new evidence. This also is a prerequisite to granting such motions. But this could not be true of testimony offered as to the conduct of George subsequent to the trial tending to show that he had not in fact sustained serious injury.

It was held in the case of *Medlock v. Jones*, 152 Ark. 57, 237 S. W. 438, that it was error to deny a new trial for newly discovered evidence, not cumulative which tended to overcome appellee's testimony upon which alone she had relied for a recovery. In that case admissions were shown to have been made by appellee subsequent to the trial

which contradicted testimony given by her at the trial upon which she had prevailed, which subsequent admissions would defeat a recovery.

In the case of *Forsgren v. Massey, supra*, testimony was offered to establish the fact which appellant here sought to establish that the plaintiff had "faked" paralysis of his leg, this being an injury to compensate which he had recovered judgment for damages.

The testimony in that case was to the effect that the plaintiff appeared in public on crutches, dragging his leg as if he had no use of it, whereas, in the privacy of his home, he discarded his crutches and made normal use of his leg. It was held that this newly-discovered evidence entitled defendant to a new trial, it being said that in actions for damages for personal injury there must be both actionable negligence and an injury, and that the injury and the extent thereof were vital questions in the case as determinative of the amount of the recovery.

The statutory penalty is prayed in this case upon the ground that the appeal is without merit and was prosecuted for delay. It is provided by statute (§ 2784, Pope's Digest) that upon affirmance of a judgment for the payment of money, the collection of which has, in whole or in part, been superseded, 10 per centum of the amount superseded may be awarded at the discretion of the court against the appellant in cases where the appeal was taken for delay.

But this case presents none of the appearance of an appeal prosecuted for delay, and we do not so find. It has every appearance of having been prosecuted in the utmost good faith, indeed, if the testimony offered on the hearing of the motion for a new trial, to the effect that George was a malingerer and had "faked" his injury, as evidenced by his conduct subsequent to the trial, was not denied or explained, we would be required, upon the authority of the case of *Forsgren v. Massey, supra*, as well as that of *Medlock v. Jones, supra*, to order a new trial for this newly-discovered evidence. This testimony was considered and

passed upon by the trial judge, as well as the denials and explanations thereof, and we are unable to say that there was an abuse of discretion in refusing to grant a new trial.

The judgment, denying the motion for a new trial, will, therefore, be affirmed; but the motion here for the imposition of a penalty as having prosecuted this appeal for purposes of delay will be overruled and denied.

APPENDIX "C".

United States Circuit Court of Appeals
Eighth Circuit

No. 11,792

MAY TERM, A. D. 1940.

Appeal from the District Court of the United States for
the Eastern District of Arkansas.

MISSOURI PACIFIC TRANSPORTATION COMPANY

and

COMMERCIAL CASUALTY INSURANCE COMPANY OF NEWARK,
NEW JERSEY, *Appellants*,

v.

J. C. GEORGE, J. H. LOOKADOO AND G. W. LOOKADOO,
Appellees.

October 1, 1940

Before Judges SANBORN, WOODROUGH and THOMAS, *Circuit
Judges*

Per Curiam

This is an appeal from a judgment dismissing the plaintiff's bill of complaint and the bill of intervention of Commercial Casualty and Insurance Company for want of equity and want of merit.

In its second amended bill of complaint the plaintiff alleged that on August 22, 1938, the defendant J. C. George falsely pretended that he was injured by plaintiff's buses in Clark County, Arkansas; that thereafter George brought suit in the state court against plaintiff and recovered judgment for \$15,000.00; and that thereafter plaintiff learned for the first time that George's alleged injury was feigned and that one Claud Denison knew that George had planned to pretend such injury and to make a false claim for

damages therefor. An affidavit was obtained from Claud Denson setting out the facts. Based upon such affidavit and other testimony plaintiff moved for a new trial in the state court. Thereupon George and his attorneys conspired to defeat justice by causing Claud Denson falsely to testify on the hearing on the motion for a new trial that he did not hear George plan to simulate the alleged injury; and that to effect the object of the conspiracy the defendants did intimidate Denson falsely to testify at said hearing, with the result that the motion for a new trial was overruled. Notwithstanding the alleged fraud, upon appeal to the Supreme Court of Arkansas the judgment overruling the motion for a new trial was affirmed.

George and his attorneys in the case in the state court are defendants in this suit.

The prayer of the amended bill of complaint is that the defendants be enjoined from collecting the judgment in the state court; and, in the alternative, for damages for \$15,000.00 with interest and costs. The Commercial Casualty and Insurance Company, surety on plaintiff's supersedeas bond in the preceedings on appeal in the state court, intervened and joined in the prayer for an injunction.

The defendants denied all the material allegations of the complaint and alleged that all the matters in respect of the alleged fraudulent conspiracy had been presented to the state court in the motion filed therein for a new trial; that after a fair trial the motion had been overruled; and that by such adjudication the plaintiff is estopped to rely upon the same matters in this case. Defendants prayed that the petition for injunction be denied and for judgment for costs.

Plaintiff demanded a jury trial, which demand was refused, and the case was tried to the court. Findings of fact and conclusions of law were made by the court and judgment entered for defendants.

On this appeal three general grounds for reversal are urged. They are that the court erred (1) in sustaining the

plea of *res judicata*, (2) in denying appellant's motion for a jury trial, and (3) in finding that no fraud was practiced on appellant in the state court proceeding.

Were the judgment appealed from based solely upon the plea of *res judicata* it is possible that the court erred. In the view we take of the case it is not necessary to consider that question.

The court did not err in denying a jury trial. The first and principal demand of the plaintiff and of the intervener is for an injunction. The alternative demand is for damages. The right to relief upon both demands depended upon the proof of the fraudulent conspiracy alleged in the complaint. The appellant was not entitled of right to a jury trial on the issue for an injunction. The granting of a jury trial upon an equitable issue is discretionary with the court. Further, the record does not show that the appellant served its demand for a jury trial upon the other parties to the suit or that it indorsed such demand upon its pleadings as provided in Rule 38(b) of the Rules of Civil Procedure, 28 U. S. C. A. following section 723, subsection (d) of which rule provides that "The failure of a party to serve a demand as required by this rule . . . constitutes a waiver of trial by jury."

The controlling question in the case is whether the defendants were guilty of perpetrating the fraud upon the plaintiff alleged in the complaint. In addition to the documentary evidence introduced upon the trial the court heard and considered the testimony of 18 witnesses. Upon the whole record the court found.

"15. And from the testimony of the said eighteen witnesses who have testified before this court in this case the court finds that no fraud was perpetrated by the defendants herein and that the defendants did not intimidate or attempt to intimidate any witness or person in any of the trials in the Circuit Court of Clark County, Arkansas, between the said Missouri Pacific Transportation Company and the said J. C. George and that in the said trials and in the preparation there-

for the defendants herein sought only to have all of the witnesses to testify the truth and that the defendants herein have not been guilty of any wrongful or improper conduct whatsoever."

And the court concluded that:

"3. Upon the facts found by the court from the testimony of the said eighteen witnesses as set out in findings of fact No. 15, herein, the court concludes the law to be that the allegations of the plaintiff's said second amended bill of complaint and the allegations of the intervenor's bill of intervention are without equity or merit and that neither the plaintiff nor the intervenor is entitled to prevent or further hinder the defendants herein from the collection of the judgment recovered by the said J. C. George against the said Missouri Pacific Transportation Company in the Circuit Court of Clark County, Arkansas, and that the said second amended bill of complaint and the said bill of intervention should be dismissed for want of equity and for want of merit."

The findings are based upon conflicting testimony. The appellant's contention is that the quoted finding is not supported by a preponderance of the evidence. We have examined the evidence, and the quoted finding is supported by substantial evidence. It is not, therefore, clearly erroneous. It can not for that reason be set aside by this court. Rule 52(a), Rules of Civil Procedure. The conclusion of the court that the bill is without equity or merit follows. The judgment dismissing the complaint and the petition for intervention must, therefore, be, and it is, affirmed.

APPENDIX "D".**Extract from Second Amended Complaint Filed in U. S.
District Court. (R. 43, et seq.)**

"Plaintiff shows that after said trial was had in the Circuit Court of Clark County, Arkansas, in said cause, this plaintiff secured an affidavit from said Claud Denson representing the true facts; that is, that J. C. George had not in fact been injured by plaintiff's bus in the city of Gurdon, Clark County, Arkansas. Based upon said affidavit and other testimony in support thereof, Missouri Pacific Transportation Company filed in due course of time its motion for new trial in the Circuit Court of Arkansas, Clark County, supported by the affidavit of Claud Denson and other affidavits. That thereafter the defendants, J. C. George, J. H. Lookadoo and G. W. Lookadoo caused the said Claud Denson to return to Clark County, Arkansas. That Forest Denson with a criminal charge of larceny in the was and is the father of Claud Denson, but after the return of the said Claud Denson to Clark County, Arkansas, the defendants threatened the arrest and prosecution of Forest Denson with a criminal charge of larceny in the courts of Clark County, Arkansas, unless the said Forest Denson would make his son, Claud Denson, retract his statement and affidavit to the effect that the pretended injury of the said J. C. George was false and simulated. That a complaint was actually lodged against the said Forest Denson in the court of Clark County, Arkansas, charging him with grand larceny. It is shown that a motion for a new trial was filed in the Circuit Court of Clark County, Arkansas, by the Missouri Pacific Transportation Company and was to be heard on the 22nd day of January, 1940. That at said time, the defendants J. C. George, J. H. Lookadoo and G. W. Lookadoo, knew that Forest Denson's son, Claud Denson, was to testify to facts on the motion of the Missouri Pacific Transportation Company for a new trial, which would show that the pretended injury upon which there had been secured said verdict in the sum of \$15,000 was false and simulated, and based upon said facts and said testimony of Claud Denson, the trial court would be required under the law to set aside said judgment and the verdict of the jury of the Circuit Court of Clark County, Arkansas, and grant a new trial in said cause of J. C.

George v. Missouri Pacific Transportation Company in said court of Clark County, Arkansas. Plaintiff transportation company shows the defendants were cognizant of the above and foregoing facts and that on or about the 20th day of January, 1940, the defendants, J. C. George, G. W. Lookadoo and J. H. Lookadoo fraudulently confederated, combined and conspired that G. W. Lookadoo and Forest Denson would proceed to DeQueen, Arkansas, in Sevier County, Arkansas, where they would then and there, and did, secure the services and aid of one J. T. Manning, the said J. T. Manning being then and there an under-sheriff or Deputy Collector at DeQueen, Arkansas, Sevier County.

"That the defendants, G. W. Lookadoo, accompanied by Forest Denson, the father of Claud Denson and the said J. T. Manning proceeded to the home of Claud Bailey near the city of DeQueen Arkansas, and did then and there by force, threats and fraud, cause the said Claud Denson, to agree to testify in the hearing on the motion for a new trial of the Missouri Pacific Transportation Company in the Circuit Court of Clark County, Arkansas, to be heard on January 22, 1940, to the effect that he, the said Claude Denson, did not hear the said J. C. George falsely plan and simulate an injury to him by a driver of the bus of the Missouri Pacific Transportation Company and that he, the said Claude Denson, did not see the said J. C. George at the time he pretended an injury to his person in the city of Gurdon, Clark County, Arkansas, by a passenger bus of the Missouri Pacific Transportation Company, which said claim had formed the basis of the suit therein and on which a judgment had been obtained in the sum of the \$15,000 as hereinbefore alleged.

"That in pursuance of said fraud and conspiracy, G. W. Lookadoo and Forest Denson proceeded to the city of DeQueen in Sevier County, Arkansas, and induced the said J. T. Manning, an officer as aforesaid, at DeQueen, Arkansas, to accompany them to the home of Claud Bailey, where the said Claud Denson was residing with his mother, and they did on or about the 20th day of January, 1940, inform the said Claud Denson in effect that unless he, Claude Denson, testified favorably to J. C. George on the hearing of the motion for a new trial filed by Missouri Pacific Transportation Company in the Circuit Court of Clark County, Arkansas, that Forest Denson, father of said Claud Denson, would be sent to the penitentiary on the charge of larceny. That

the presence of the officer, to wit, J. T. Manning, together with the said Claud Denson's father, to wit, Forest Denson, and the said G. W. Lookadoo, in support of representations to the said Claud Denson and by said fraud and duress caused the said Claud Denson to leave the home where he was residing with his mother and accompany them to Clark County, Arkansas, whereupon the continued threats, duress and fraud were held over the said Claud Denson so that he did on or about the 22nd day of January, 1940, when the hearing was had on the motion for a new trial filed by Missouri Pacific Transportation Company, to testify to matters favorable to the said J. C. George in order that the trial court would and did overrule said motion for a new trial, thereby enabling the defendants to deprive this plaintiff of its property through the offices of said judgment against plaintiff transportation company in the sum of \$15,000, together with costs and interests.

“VI.

“Plaintiff shows but for fraud and duress exercised and exerted upon said Claud Denson as herein alleged, the court would have received the true facts in reference to the false and fraudulent claim of J. C. George on said pretended injury to his person and that a new trial would have resulted whereby plaintiff transportation company would not have been bound to pay the defendant J. C. George the sum of \$15,000.”

